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7 DZ RESERVE and CAIN MAXWELL
8 (d/b/a Max Martialis), individually and on
behalf of others similarly situated,

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9 Plaintiffs,

10 v.

11 META PLATFORMS, INC.,
12 Defendant.

Case No. [18-cv-04978-JD](#)

ORDER RE ARBITRATION

13 The Court certified a class of United States residents who purchased one or more
14 advertisements on Meta's platforms from August 15, 2014 to the present. Dkt. No. 388 at 3, 17.
15 The class alleges that defendant Meta Platforms, Inc. (Meta) intentionally misrepresented the
16 "Potential Reach" of advertisements on its social media platform when selling ads to the class.
17 Dkt. No. 332. The Ninth Circuit affirmed the certification of the damages class, *see* Dkt. No. 449,
18 and the last stop in this long-running saga is a jury trial on the class's claims.¹

19 This case started in 2018, and in the seven years that have since passed, Meta mentioned
20 the possibility of going to arbitration exactly once. Even so, on the eve of a jury trial scheduled to
21 begin on October 14, 2025, Meta sailed in on August 21, 2025, a motion to compel arbitration for
22 the claims of "class members other than Named Plaintiffs (DZ Reserve and Cain Maxwell) who
23 purchased an advertisement through Meta between May 25, 2018, and October 27, 2021,

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28 ¹ The circuit vacated the certification of an injunction class for claims under California's Unfair
Competition Law (UCL), holding that "DZ Reserve does not have standing to seek injunctive
relief" and directing the Court to determine if plaintiff Maxwell has standing. Dkt. No. 449 at 25-
27. Plaintiffs have confirmed on remand that they will not seek certification of a Rule 23(b)(2)
class for injunctive relief, and plaintiff Maxwell is considering whether to pursue injunctive relief
under the UCL on an individual basis. Dkt. No. 464. If Maxwell so chooses, the Court will
resolve his UCL claim, including his standing to pursue it, after the jury trial. *See id.*

1 inclusive.” Dkt. No. 472.² Meta asks that the Court send these class members to arbitration and
2 redefine the class to exclude them from the trial. *Id.* The parties’ familiarity with the record is
3 assumed, and arbitration is denied.

4 DISCUSSION

5 I. **LEGAL STANDARDS FOR ARBITRATION MOTIONS AND THE EXISTENCE** 6 **OF AN APPLICABLE ARBITRATION AGREEMENT HERE**

7 Meta seeks arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et seq. Dkt.
8 No. 472. The FAA’s “overarching purpose . . . is to ensure the enforcement of arbitration
9 agreements according to their terms so as to facilitate streamlined proceedings.” *AT&T Mobility*
10 *LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Under Section 4 of the FAA, the Court’s role is
11 generally “limited to determining whether a valid arbitration agreement exists and, if so, whether
12 the agreement encompasses the dispute at issue.” *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*,
13 363 F.3d 1010, 1012 (9th Cir. 2004). “If the party seeking to compel arbitration establishes both
14 factors, the district court ‘must order the parties to proceed to arbitration only in accordance with
15 the terms of their agreement.’” *McBurnie v. Acceptance Now, LLC*, 643 F. Supp. 3d 1041, 1045
16 (N.D. Cal. 2022) (quoting *Lifescan*, 363 F.3d at 1012), *aff’d sub nom. in pertinent part, McBurnie*
17 *v. RAC Acceptance East, LLC*, 95 F.4th 1188 (9th Cir. 2024).

18 Meta says, without disagreement by plaintiffs, that a valid and binding arbitration
19 agreement applies to the class members’ claims in this case. *See* Dkt. Nos. 472, 500. The
20 arbitration agreement is contained in Facebook’s Commercial Terms implemented on May 25,
21 2018, and states that “these Commercial Terms require the resolution of most disputes between
22 you and [Facebook, now Meta] by binding arbitration on an individual basis.” Dkt. No. 472 at 2-
23 6; *see also* Dkt. Nos. 472-6, 472-7, 472-8. Plaintiffs do not challenge Meta’s contention that
24 “[u]nnamed class members who purchased ads as of May 25, 2018, entered into valid arbitration
25 agreements with Facebook when they affirmatively assented to the Commercial Terms by

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² On October 6, 2025, during the federal government’s lapse in appropriations, the Court vacated
the trial date based on concerns that a jury trial would not be sustainable. Dkt. No. 532.

1 purchasing ads,” and that “[t]his dispute falls within the scope of the parties’ arbitration
2 agreement.” Dkt. No. 472 at 8; *see* Dkt. No. 500.

3 II. THE COURT DECIDES WAIVER

4 This record would seem to present a slam dunk in favor of arbitration, but that is decidedly
5 not the situation. Meta has asked to compel arbitration at the very end of this long-running
6 litigation and just before trial. This raises the question of whether Meta has waived the right to
7 ask for arbitration.

8 Like any other contractual right, an arbitration agreement can be waived. *See McBurnie*,
9 643 F. Supp. 3d at 1045. Plaintiffs urge that Meta has waived any right to compel arbitration in
10 the final act of the case. *See* Dkt. No. 500. They do so with good reason. The one and only time
11 Meta previously mentioned the possibility of arbitration was during class certification proceedings
12 that took place in 2021 and 2022. In the March 2022 order granting certification, the Court
13 expressly stated that Meta had sat on its contractual rights, and that “[a] good argument can be
14 made that Meta has waived arbitration on this record.” Dkt. No. 388 at 7. Even so, Meta never
15 addressed the obvious question of waiver in its opening brief to compel arbitration that it filed in
16 August 2025, and instead sandbagged plaintiffs by waiting to say in a reply brief that it had not
17 waived arbitration and that an arbitrator, not the Court, should decide the waiver issue. *See* Dkt.
18 No. 501 at 3-4. Fairness and due process demand that Meta’s gamesmanship not go unanswered,
19 and so plaintiffs’ request to file a sur-reply is granted. Dkt. No. 508.

20 Meta’s delegation suggestion is also poorly taken. The “gateway issues” for arbitration
21 such as “waiver by litigation conduct” are presumptively “for judicial determination unless the
22 parties clearly and unmistakably provide otherwise.” *Martin v. Yasuda*, 829 F.3d 1118, 1123 (9th
23 Cir. 2016) (quotations and citations omitted). “Every circuit that has addressed this issue --
24 whether a district court or an arbitrator should decide if a party waived its right to arbitrate through
25 litigation conducted before the district court -- has reached the same conclusion.” *Id.* This makes
26 perfect sense, as the arbitrator “does not have expertise regarding whether litigation conduct *in*
27 *front of the district court* was enough to constitute revocation of the arbitration clause.” *Id.* n.3

1 (emphasis in original). Consequently, “courts generally decide whether a party has waived his
2 right to arbitration by litigation conduct.” *Id.* at 1124.

3 “If the parties intend that an arbitrator decide [the waiver] issue under a particular contract,
4 they must place clear and unmistakable language to that effect in the agreement.” *Id.* The
5 arbitration agreement here does the opposite, and expressly states that “only a court may decide
6 issues relating to the scope or enforceability of this arbitration provision.” Dkt. No. 472-6 at ECF
7 p. 2; *see also* Dkt. No. 472-7 at ECF p.3 (same); Dkt. No. 472-8 at ECF p.3 (same). This plain
8 language designates the Court to decide gateway arbitrability issues, including waiver. Meta made
9 no honest effort to account for this provision, and instead made the disingenuous suggestion that
10 the agreement reserved issues of “scope, enforceability, and the interpretation of any prohibition
11 on class actions” to the Court but delegated to the arbitrator the issue of waiver by not mentioning
12 it. Dkt. No. 501 at 3-4. Nothing in the contract even remotely supports that notion.

13 So too for the case law, which definitively rejects Meta’s theory that the omission of
14 “waiver” in an arbitration clause is tantamount to delegation. In *Martin*, for example, the
15 arbitration clause stated that “all determinations as to the scope, enforceability and effect of this
16 arbitration agreement shall be decided by the arbitrator, and not by a court,” which was held to be
17 “insufficient to show an intent that an arbitrator decide the waiver by litigation conduct issue and
18 to overcome the presumption to the contrary.” *Martin*, 829 F.3d at 1124. In *Cox v. Ocean View
19 Hotel Corp.*, 533 F.3d 1114 (9th Cir. 2008), the arbitration agreement stated that “[a]ny
20 controversy . . . involving the construction or application of the terms, provisions, or conditions of
21 this Agreement or otherwise arising out of or related to this Agreement shall likewise be settled by
22 arbitration,” which was also not deemed to be a clear and unmistakable delegation of the question
23 of waiver to the arbitrator. *Cox*, 533 F.3d at 1117; *see also* *Martin*, 829 F.3d at 1124. These
24 holdings foreclose Meta’s tortured reading of the arbitration agreement here, particularly given
25 that it plainly assigns gateway issues to the Court.

26 All of this establishes that the question of waiver is for the Court to decide. That the
27 arbitration agreement “incorporates the AAA arbitration rules” is of no moment. *See* Dkt. No. 501
28 at 4. The plain language of the contract -- which Meta acknowledges overrides any delegation

1 implicit in the incorporation of the AAA rules -- clearly reserved gateway issues such as waiver
2 for the Court.

3 **III. META HAS WAIVED THE RIGHT TO ARBITRATE**

4 The “test for waiver of the right to compel arbitration consists of two elements:
5 (1) knowledge of an existing right to compel arbitration; and (2) intentional acts inconsistent with
6 that existing right.” *Hill v. Xerox Business Servs., LLC*, 59 F.4th 457, 468 (9th Cir. 2023). There
7 is no longer a requirement to find “prejudice to the person opposing arbitration from such
8 inconsistent acts.” *Id.* (quoting *Newirth v. Aegis Senior Communities, LLC*, 931 F.3d 935, 940
9 (9th Cir. 2019), abrogated by *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022)). The party
10 opposing arbitration “bears the burden of showing waiver,” but the burden is not a “heavy” one;
11 rather, “the burden for establishing waiver of an arbitration agreement is the same as the burden
12 for establishing waiver in any other contractual context.” *Armstrong v. Michaels Stores, Inc.*, 59
13 F.4th 1011, 1014-15 (9th Cir. 2023).

14 Plaintiffs have amply carried their burden of establishing waiver. To start, they
15 demonstrated, without objection by Meta, that Meta had knowledge of its asserted right to
16 arbitrate. Dkt. No. 500 at 8-9; *see* Dkt. No. 501. The first element of waiver has been proved.

17 For the second element, plaintiffs have demonstrated that Meta acted wholly inconsistently
18 with the contractual right to arbitrate. *See* Dkt. No. 500 at 9-14. As indicated by the 471 filings
19 entered on the ECF docket before Meta asked for arbitration, this case has been hotly litigated in
20 the federal courts from day one in 2018. Among many other substantive events, Meta filed three
21 motions to dismiss, a motion for judgment on the pleadings, an opposition to class certification
22 and a largely unsuccessful appeal of certification to the circuit court, a summary judgment motion,
23 motions to disqualify plaintiffs’ expert witnesses, discovery dispute letters, and a jointly agreed
24 motion with respect to class notice of trial, which the Court approved. *See, e.g.*, Dkt. Nos. 23, 65,
25 70, 75, 76, 95, 97, 103, 109, 110, 121, 122, 124, 125, 133, 134, 177, 180, 270, 285, 286, 294, 372,
26 373, 374, 398, 449, 470. Plaintiffs state, without objection, that Meta also engaged in “robust”
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1 discovery over the years that the case has been pending.³ Dkt. No. 500 at 11. All of these
2 substantive events transpired with virtual silence on Meta's part about the possibility of
3 arbitration.

4 Meta's record of active litigation in court is in telling contrast to cases where waiver has
5 been found. In such cases, the defendant typically has "repeatedly reserved its right to arbitration,
6 did not ask the district court to weigh in on the merits, and did not engage in any meaningful
7 discovery." *Armstrong*, 59 F.4th at 1013; *see also id.* at 1015 ("Michaels pleaded arbitration as an
8 affirmative defense in its answers to both the original complaint and amended complaint, and
9 explicitly and repeatedly stated its intent to move to compel arbitration in both case management
10 statements and in the initial case management conference before the district court").

11 Meta's conduct could not have been more different. It has fought in court without pause,
12 and by its own admission mentioned the possibility of arbitration only once since 2018, which was
13 in its opposition brief to class certification. *See* Dkt. No. 501 at 7; Dkt. No. 472 at 1. Even then,
14 Meta said only:

15 Finally, Plaintiffs are atypical and inadequate insofar as they seek to
16 represent advertisers who purchased ads on or after May 28, 2018,
17 the date an arbitration provision in Facebook's Commercial Terms
18 became effective. Exs. 76-77; *see also Avilez v. Pinkerton Gov't
Servs. Inc.*, 596 F. App'x 579, 579 (9th Cir. 2015) (holding plaintiff
atypical and inadequate where absent class members had defenses to
an arbitration provision different from plaintiff).

19 Dkt. No. 294 at 17. This comment was accompanied by a footnote: "Facebook has not waived its
20 right to enforce the provision against absent class members. *See Rushing v. Williams Sonoma,
Inc.*, 2020 WL 6787135, at *3 (N.D. Cal. Oct. 8, 2020)." *Id.* n.13. It bears highlighting that
21 Meta's statement that it had "not waived" the arbitration provision is well short of saying that it
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25 ³ "Robust" is an understatement. Even before plaintiffs filed a motion for class certification in
26 April 2021, the ECF docket contained 280 entries, many of which related to discovery disputes.
27 *See* Dkt. Nos. 1-280. The discovery process in this case was so active and contentious that the
28 Court instituted the unusual measure of directing counsel for the parties to have "weekly discovery
calls." Dkt. No. 130. Not once in the course of this vigorous and comprehensive discovery did
Meta ever note that it would be seeking to resolve the claims of many absent class members
through arbitration or seek to exempt them from the scope of discovery.

1 would actually seek to enforce it. *See Hill*, 59 F.4th at 471 (“A reservation of rights is not an
2 assertion of rights.”) (quotations and citation omitted).

3 Meta protests that it could not have moved earlier to compel the unnamed class members
4 to arbitrate because the unnamed class members were not actually parties to the lawsuit until class
5 notice was distributed and the opt-out period closed. *See* Dkt. No. 472. The point may be
6 assumed solely for discussion, and it does not do the work Meta asks of it. As our circuit has
7 concluded, “waiver is a unilateral concept,” and a determination of waiver “does not depend upon
8 when the law requires or authorizes such a right to be asserted.” *Hill*, 59 F. 4th at 469. “[W]hen
9 engaging in an implied waiver analysis, the omission is viewed through the lens of the defendant’s
10 other actions rather than from the perspective of when the law demands that an argument be
11 raised.” *Id.* at 472 n.18. Even if Meta “could not actively move to compel arbitration until the
12 moment that it did, the inferences drawn from the record all point towards waiver.” *Id.* at 473.

13 Overall, Meta waged a seven-year campaign of litigating this case in two federal courts,⁴
14 and took full advantage of the procedures available in the court system, while staying silent about
15 the arbitration agreement. Contrast this record to the one in *Armstrong*, where the defendant “was
16 consistently vocal about its intent to move to compel arbitration.” *Armstrong*, 59 F.4th at 1015;
17 *see also id.* at 1016 (“Michaels never wavered from the view that it had a right to arbitration, as
18 evidenced by Michaels moving to compel arbitration within a year after Armstrong filed the
19 complaint, never seeking or obtaining a ruling on the merits, and never waffling about whether to
20 arbitrate or stay in district court. Finally, Michaels’s limited discovery requests did not evince a
21 decision to take advantage of the judicial forum.”).

22 Consequently, plaintiffs have demonstrated that the totality of Meta’s conduct in court
23 amounts to a clear waiver of the contractual arbitration provision with respect to the absent class
24 members.⁵ *See Hill*, 59 F.4th at 471 (“There is no concrete test to determine whether a party has

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26 ⁴ Meta’s effort to involve a third federal court was thwarted when the United States Supreme
Court denied its petition for a writ of certiorari. Dkt. No. 455.

27 ⁵ Meta squarely concedes that it “has waived the right to compel Named Plaintiffs to arbitrate.”
28 Dkt. No. 501 at 6 n.4. It has failed to identify any good reason why the result should be different
for the absent class members.

1 engaged in acts inconsistent with its right to arbitrate; rather, we consider the totality of the
2 parties' actions.") (quotations and citation omitted). Under prevailing standards, the question of
3 whether this conduct prejudiced plaintiffs is irrelevant, and the Court did not consider or rely upon
4 potential prejudice in this order. Meta's request to compel arbitration is denied.

5 **CONCLUSION**

6 As a closing observation, the Court is concerned about the timing of Meta's arbitration
7 request at this late date in the case and just before the start of a jury trial. A denial of arbitration is
8 immediately appealable, *see* 9 U.S.C. § 16(a), and it seems likely that Meta will file an
9 interlocutory appeal. It already tried to do that even before the Court decided its request. *See* Dkt.
10 No. 529. Plaintiffs have been waiting many years now for their day in court. A long delay was
11 caused by Meta's unsuccessful appeal of the class certification order, and another delay in
12 connection with this order may be imminent. If Meta files another appeal, the Court requests that
13 the circuit "proceed with appropriate expedition when considering [Meta's] interlocutory appeal
14 from the denial of the motion to compel arbitration." *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 747
15 (2023).

16 **IT IS SO ORDERED.**

17 Dated: December 2, 2025



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19 JAMES DONATO
20 United States District Judge
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